THE RECORD
OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

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Association Activities

THE SIXTEENTH Annual Benjamin N. Cardozo Lecture was delivered by Dean Jefferson B. Fordham of the University of Pennsylvania Law School. Dean Fordham's topic was "The Legal Profession and American Constitutionalism," and is published in this issue of THE RECORD.

THE COMMITTEE on Labor and Social Security Legislation, Emanuel Dannett, Chairman, has organized its work for the coming year under the following subcommittees: arbitration, control of welfare funds, corruption and racketeering in unions, federal labor court, legislation; and state and federal labor board jurisdiction.

AT ITS organization meeting the Committee on Real Property Law, Benjamin Pollack, Chairman, had as its guest James I. Felt, Chairman of the City Planning Commission. The Committee's membership has been increased so as to permit it to consider problems in connection with the housing laws.

THE ADVISORY Committee on Alcoholism of the New York State Interdepartmental Health Resources Board has published a book-

let entitled "Problem Drinking and Alcoholism." Arthur N. Seiff, Chairman of the Association's Committee on Medical Jurisprudence, is a member of the Advisory Committee.

DAPHNE LEEDS, Assistant Commissioner of Patents, was the guest of the Committee on Trade Marks and Unfair Competition, of which Harold R. Medina, Jr. is Chairman. Mrs. Leeds participated in a general discussion of procedures and practice in the Patent Office.

THE COMMITTEE on International Law, John R. Stevenson, Chairman, has under preparation reports on the following matters: Status of Forces Treaties; Bricker Amendment; GATT and OTC; Foreign Investments; and Law of the Sea.

THE COMMITTEE on Continuing Legal Education, of which Harrison Tweed is Chairman, has announced the publication of "Criminal Aspects of Tax Fraud Cases" by Boris Kostelanetz and Louis Bender. The volume can be ordered from the Committee at 133 South 36th Street, Philadelphia 4, for $3.00.

THE INTERNATIONAL Congress of Comparative Law will be held in Brussels from August 4 to 9, 1958. The Congress is under the auspices of the International Academy of Comparative Law. Further information may be secured from Professor Hessel E. Yntema, University of Michigan Law School, Ann Arbor.

A SEMINAR on Law and Psychiatry will be given by the William Alanson White Institute of Psychiatry, Psychoanalysis and Psychology, starting January 10, 1958. The interrelationships of law and psychiatry will be studied by examining the underlying assumptions in these as reflected in contemporary court procedure,

legal practice and systems of law. This seminar, to be conducted by two psychiatrists, Dr. Charles C. Dahlberg and Dr. Meyer Maskin, and a lawyer, Sidney M. Davis, will meet for 10 two-hourly sessions, every two weeks. Further information can be obtained by calling or writing the William Alanson White Institute, 12 East 86th Street, New York City. (TR 9-9235).

The Calendar of the Association for December and January

(As of December 9, 1957)

December 2	Dinner Meeting of Committee on Professional Ethics Meeting of Committee on State Legislation
December 3	Meeting of Section on Wills, Trusts and Estates Dinner Meeting of Committee on International Law Dinner Meeting of Committee on Corporate Law Meeting of Special Committee on Public and Bar Relations Meeting of Committee on Entertainment
December 4	Dinner Meeting of Executive Committee
December 5	Dinner Meeting of Committee on Taxation Meeting of Special Committee to Study Passport Procedures Dinner Meeting of Special Committee on the Administration of Justice
December 10	*Stated Meeting of the Association, 8:00 P.M., Buffet Supper, 6:15 P.M.* Meeting of Committee on Trade Regulation Meeting of Committee on Legal Aid
December 12	Dinner Meeting of Committee on Admiralty Dinner Meeting of Committee on Administrative Law Meeting of Committee on Art
December 16	Meeting of Library Committee Meeting of Committee on Labor & Social Security Legislation Meeting of House Committee Meeting of Special Committee to Cooperate with the International Commission of Jurists Meeting of Young Lawyers Committee
December 17	Meeting of Section on Labor Law Dinner Meeting of Committee on Foreign Law Meeting of Committee on the Domestic Relations Court

December 17 Dinner Meeting of Committee on Courts of Superior Jurisdiction
Dinner Meeting of Committee on Federal Legislation
Dinner Meeting of Committee on the Bill of Rights

December 18 Meeting of Committee on Admissions
National Moot Court Competition. Sponsorship Young Lawyers Committee

December 19 National Moot Court Competition. Sponsorship Young Lawyers Committee

December 20 National Moot Court Competition. Sponsorship Young Lawyers Committee

December 23 Dinner Meeting of Committee on Real Property Law

January 6 *Twelfth Night Festival.* Sponsorship Entertainment Committee

January 7 Dinner Meeting of Committee on International Law
Dinner Meeting of Committee on Federal Legislation
Dinner Meeting of Committee on Legal Aid

January 8 Dinner Meeting of Executive Committee
Meeting of Section on Wills, Trusts and Estates

January 9 Dinner Meeting of Committee on Trade Marks and Unfair Competition

January 13 Dinner Meeting of Committee on Medical Jurisprudence
Dinner Meeting of Committee on Professional Ethics
Dinner Meeting of Committee on the Bill of Rights
Meeting of Section on Trade Regulation

January 14 Dinner Meeting of Committee on Insurance Law
Meeting of Committee on State Legislation
Joint Dinner Meeting of Sections on Administrative Law and Procedure and Banking, Corporation and Business Law
Dinner Meeting of Committee on Corporate Law

January 15 Meeting of Committee on Admissions
Meeting of Section on Litigation

January	15	Dinner Meeting of Committee on Foreign Law Dinner Meeting of Committee on the Domestic Relations Court Dinner Meeting of Committee on Courts of Superior Jurisdiction
January	16	Dinner Meeting of Special Committee on Military Justice
January	20	Meeting of Library Committee
January	21	*Stated Meeting of the Association, 8:00 P.M. Buffet Supper, 6:30 P.M.* Meeting of Committee on State Legislation
January	22	Meeting of Section on Jurisprudence and Comparative Law
January	28	Meeting of Committee on State Legislation
January	29	Meeting of New York State Bar Association Food, Drug and Cosmetic Law Section Meeting of New York State Bar Association Banking Law Section
January	30	Meeting of New York State Bar Association Anti-Trust Law Section
January	31	Annual Meeting of New York State Bar Association

The President's Letter

To the Members of the Association:

Some years ago, under Mr. Webster's presidency, the experiment was tried of holding a Stated Meeting in the late afternoon instead of the evening. It was a one shot effort and the notice to members did not emphasize sufficiently the change in time, with the result that the attendance at that late afternoon meeting was not good.

Due, among other circumstances, to the fact that today so many members commute and find it difficult to attend meetings starting after eight o'clock, the suggestion has been revived and favorably considered by the Executive Committee. The idea will be to start at five or five-fifteen o'clock, conclude the business of the Stated Meeting by seven, follow with a libation and supper for those who want to remain and after supper provide one of the many interesting lectures or section meetings with which the program of Association activities is now so rich. Ample notice and emphasis on the new time will be given. Enough meetings will be held at the new time to provide a fair test. We shall then be in a position intelligently to reappraise the situation and determine whether the earlier start for Stated Meetings should be permanently adhered to or whether it seems preferable to return to the old evening starting time. I urge the members to give it a go and, after a fair trial, to let the administration know your preference.

LOUIS M. LOEB

November 15, 1957

The Legal Profession and American Constitutionalism

By JEFFERSON B. FORDHAM
Dean, University of Pennsylvania Law School

THE SIXTEENTH ANNUAL BENJAMIN N. CARDOZO LECTURE DELIVERED BEFORE THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK ON OCTOBER 24, 1957

Leadership in public affairs is a great and cherished tradition of the American Bar. In the founding of the Republic, and at critical stages of our history, great figures have emerged to meet the occasion. More often than not, these leaders, like Marshall and Lincoln, were trained in the law. Less conspicuous, but hardly less important, has been the steady contribution to leadership at all community levels which has come from the profession over the years.

Today society is making extraordinary demands upon the members of the legal profession for leadership in government, in community affairs generally and in business. A little band of 250,000—less than one-fifth of one per centum of the total population—bears practically the entire responsibility for the administration of justice and has by far the most important hand of any one vocational group in the work of the executive and legislative departments. In community affairs one finds lawyers in roles of leadership in nearly all civic and cultural activities—that is conspicuously the case in my home community of Philadelphia. These things are recited to suggest what is expected of us, not what we do. We must face the question whether we are measuring up in a number of respects which are of the greatest "pith and moment." The responsibility is no less than staggering for, as it was long ago declared in Proverbs, "Where there is no vision, the people perish."

In 1934, one of the great legal figures of our century, Harlan

F. Stone, declared with regretful but becoming candor, that the Bar in our time has not maintained its traditional position of public influence and leadership.[1] He attributed this primarily to the preoccupation of the members of the profession with the demanding problems of private interests, notably business and finance. He called for stocktaking on the part of the profession and stressed the opportunity for a new emphasis in legal education on the public responsibility of the profession.

Mr. Justice Stone was speaking at a time when the problem of public as against private interest had its focus largely in the economic realm. What he had to say has not lost its general significance; but it is important to note that in the intervening years the focus has shifted. The crucial problem today is the accommodation of governmental authority with individual liberty. This is clear enough to me both in the setting of our own national community and that of the larger world community. So far as the legal profession is concerned, the contemporary call for leadership is directed preeminently to the recognition and protection of human rights.

It is my unhappy conclusion that we of the profession have been failing, in the constitutional field, to live up to the tradition of the profession in public leadership. Lawyer thought and energy have been addressed far more to the further limitation of governmental authority with a view to achieving lasting policy commitments and without special relevance to human rights, than to individual freedom and equality before the law. I am speaking here both of individual lawyers and of the organized profession. If the stated conclusion is correct, it is a basis for grave concern. Let us pursue the matter, first, in relation to American constitutional theory and development and, second, in relation to human rights.

A written constitution for a democratic society, which pursues its political ends through representative government, needs but four elements: 1. Provision of the basic framework of govern-

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[1] *The Public Influence of the Bar*, 48 HARV. L. REV. 1 (1934).

ment; 2. Distribution broadly of governmental powers within the designed framework, with secondary power-devolution left to the legislative arm; 3. Substantive and procedural guaranties to the individual against the arbitrary exercise of governmental authority—a bill of rights; and 4. Provision of machinery for change in the Constitution.

The Constitution of the United States is not perfection. The people have found occasion before now to amend it and there will be further occasions in the years ahead. There can be no question, however, but that it was so sound in basic conception that it has stood the test of nearly 175 years of experience, years marked by the most remarkable economic and social changes the world has known. It was conceived as a relatively simple and brief organic political instrument—a charter of government. Taken with the almost contemporaneous Bill of Rights and certain later amendments, it is pretty well confined to the four essentials of a constitution which I have outlined. Viewed in its total content, it is written in the large with a minimum of ephemeral specificity and of meanness of detail. This is the durable central characteristic of the Constitution.

A second major factor in the durability of the Constitution has been the role of the courts in giving it authoritative interpretation. This is not to suggest that the same conception of the function of judicial review has prevailed throughout. To Marshall it was an instrument of national supremacy wielded by a national court.[2] To his successor, Taney, the Court occupied a somewhat detached position as an arbiter of a Federal system of dual sovereignties.[3] Today the Court again employs judicial review to preserve the principle of national supremacy but it also, and very significantly, exercises it to assure to the individual the benefit of the rule of law under the safeguards of the Bill of Rights. In the performance of this function the Court has avoided the

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[2] CORWIN, Introduction to CONSTITUTION OF THE UNITED STATES ANNOTATED IX, XII (1953).

[3] *Ibid.* See also CARL B. SWISHER, ROGER B. TANEY 585 *et seq.* (1935).

rigidifying effect of unbending *stare decisis*. It has held itself capable of self-correction. Today, as in earlier periods, the Court has its sharp critics, but, except for the views of the Southern interpositionists, there is nothing akin to a frontal attack on judicial review. Interposition I simply put aside as irresponsible nullification, as a crude attack on the Union itself.[4] The great function of judicial review continues as the legitimate means of applying to the problems of today and tomorrow the principles of the Constitution which were so wisely couched in broad and general terms. That this involves a kind of constitutional evolution is not realistically to be denied.

In our time a new generation of would-be amenders is pressing its challenge to our constitutional theory and practice. These people place their faith in specificity and in restriction of governmental authority. It is noteworthy that our experience with the amending process gives them no comfort.

Of the twenty-two amendments to the Constitution of the United States, at least four enlarge the authority of the National Government. Congress was given power by each of the three Civil War Amendments to enforce it by appropriate legislation. The Sixteenth Amendment removed a limitation on the Federal taxing power.

Only one amendment, apart from the Bill of Rights, the Eighteenth, was calculated to limit the substantive powers of Congress.[5] It is the only Amendment which has been repealed.[6] It dealt with the control of human conduct in relation to intoxicating liquors and took away from Congress power to regulate, short of prohibiting, the importation or the movement in interstate commerce of intoxicating liquors for beverage purposes.

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[4] I have spoken more at length on interposition on another occasion. *In appreciation of the Supreme Court of the United States*, 28 PA. BAR ASS'N QUAR. 253 (1956).

[5] In one sense it enlarged Congressional power; it granted Congress and the state legislatures concurrent power to enforce its provisions by appropriate legislation.

[6] U. S. CONST. Amend. XXI.

The Eleventh Amendment imposed a restriction on the judicial power with respect to suits against one of the states by citizens of another or citizens or subjects of a foreign state.[7]

There have been no amendments designed to limit the executive power.

This record is encouraging. It discloses that we have been faithful, up to this point, to the proposition that the Constitution is an organic instrument designed to endure for the ages.

Efforts to amend the Constitution of the United States to incorporate more specific provisions determining policy or limiting governmental power are not new. It is not unnatural for one to want his views enshrined in the organic law and the Congressional hopper has, over the years, been receiving a variety of proposals for amendment. For the most part, they have been without significant backing.

It does seem that the voices clamoring that "there ought to be a constitutional amendment," are unusually numerous and insistent these days. Joining in this clamor has been a goodly number of lawyer voices, sounding both singly and in chorus. This is nothing new at the state level; in the state milieu there has been a deal more than clamor—there has been a very considerable transference of policy determination to the constitutional plane. I expect to have more to say about that process.

One of the vexing problems of the "amenders" is the difficulty they encounter in carrying a proposal through the procedure of amendment provided by Article V of the Constitution. It will be recalled that two methods of initiating amendments are available. 1. Congress may initiate an amendment by two-thirds vote of both houses. 2. Amendments may be initiated by a constitutional convention which the Congress "shall" call upon the application of the legislatures of two-thirds of the states. In either case ratification may be in either of two ways: a. by action of the legislatures of three-fourths of the states, or b. by action of conventions in three-fourths of the states.

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[7] This was a reaction against *Chisholm* v. *Georgia*, 2 U. S. (2 Dall.) 363 (1793).

As we all know, Congressional initiation has been the unbroken rule and there has been state legislative ratification in every instance save one. Recently, some of the "amenders" bethought themselves to invoke the second method of initiation. In the midst of their labors they were beset by the frightening realization that, once convened, a constitutional convention might propose something not at all to their taste; a convention would not be confined to any prefabricated proposals for amendment. They were very much in the psychological posture in which my older son once placed himself when he was a tiny fellow. He was terribly put out about something, so much so that he drew heavily upon his imagination and declared that he was not merely leaving home but was going so far that he could not be reached by mail. A moment's reflection brought realization of what a plight this would put him in and he promptly burst into tears.

The recourse of the amenders, led by a lawyer, has been to propose amendment of the amending article.[8] H. J. Res. 140 of the First Session, 85th Congress, is a sample. It derives from a proposal which originated within the American Bar Association but which has never gained the approval of the House of Delegates of the Association. This measure would add a third method of initiation, namely, favorable action by two-thirds vote of each house of the legislature of each of twelve states. It would provide for filing of certified copies of the proposing resolutions with the Secretary of State of the United States and the secretary of state of each state and would constitute this action due submission to the states for ratification. In this way, intervening Congressional action by way of submission would be obviated. H. J. Res. 140 would confine us to one method of ratification—action by the legislatures of two-thirds of the states.

I am led to wonder whether those who espouse such a change in the amending procedure have pondered important considerations beyond their immediate objective. What they propose is a

[8] See Wm. Logan Martin, *The Amending Power: The Ebinger Proposal*, 40 A. B. A. J. 767, 974 (1954).

method which would involve exclusively state action; it would not call for national consideration and action either by Congress or by a convention. In short, we would have a method by which the states, acting as such and with a state perspective, could undo the union. If the amenders are fully aware of these implications, of the fundamental change in the nature of our political system that would be wrought, then, they are indeed prepared to pay a high price to have their way.

Not the least ironical aspect of current proposals to limit the powers of the National Government by constitutional amendment is the resort to state precedents. One finds an example in the argumentation supporting a proposal to limit the taxing power of Congress. Proponents have pointed to the action of a number of states in writing property tax limitation amendments into their constitutions during the great depression.* such limitations are but another example of what we have been doing to state governments, and notably to state legislatures, for over a century. We have been narrowing the freedom of action of our elected representatives and cutting down the stature of state governmental institutions at the same time that governmental problems have grown more complex and demanding. This violation of the organic conception of a constitution is extremely bad constitutionalism; it has, I suggest, contributed more to the relative weakening of state government than all that we might put under the head of Federal aggrandizement.

It is this very experience with state constitutions that so strongly confirms the wisdom which went into the drafting of the National Constitution. Many of the state legislatures have been so confined and limited by their constitutions with respect to matters of substantive power and of procedure that their weakness and inadequacy have become proverbial and have made them easy prey to the lures of irresponsibility and corruption. Many of the familiar constitutional limitations came about as political responses to particular failures of legislative responsibil-

* See PUBLIC ADMINISTRATION SERVICE, PROPERTY TAX LIMITATION LAWS (P. A. S. No. 38, 1934).

ity or to particular unpopular legislative policy determinations. The result of attempted correction at the constitutional level is a continuing constriction of governmental authority, which does not relax no matter how high the level of legislative responsibility nor how demanding the need for flexibility of action.

We are at a stage in the life of the republic when the weakness of state government, and particularly the state legislative institution, is putting a strain on our Federal Union. The curious and lamentable aspect of this is the fact that it is largely self-inflicted. The people have shaped the state constitutions; they are the ones who have sharply limited the otherwise plenary powers of our state representative bodies; it is they who have made the legislatures unwieldy part-time organs; it is they who have curtailed legislative freedom of decision as to internal organization and procedure.

While this condition continues and has, in some respects, been exacerbated by recent constitutional amendments, the problems confronting the states and their local units have been growing more and more complex and compelling. Two illustrations, which have a close relationship to American federalism, may point this up. The problems of our community life do not fit neatly into conventional governmental patterns or jurisdictions. Overlying the existing local governmental configuration are some 175 supra-local or metropolitan complexes. Many of these are multi-state in reach. Overlying state lines are many regional or supra-state areas with problems of regional sweep. A good many supra-state regions are largely river valley systems. These two intermediate community levels present us with the greatest contemporary domestic challenge to our capacity for political invention and organization.[10] The states are in the position to play key roles in meeting the challenge. If they do not occupy the stage the pressure of conditions and events will be upon the National Government to act. Unhappily, the states by self-limitation have handicapped themselves as to taking the lead.

[10] See Roscoe C. Martin, *Federalism and Regionalism* (A lecture delivered at the Rice Institute, April 24, 1957. Privately printed).

It is in this context and with an eye to a restoration of the states to a more effective role in the Federal system that the President's Commission on Intergovernmental Relations has strongly urged state constitutional revision.[11] Surely the lesson of state experience is that fidelity to the organic conception of American constitutionalism is vital to the development and preservation of responsible and effective governmental institutions.

Some of the proposals for constitutional change are wondrous to behold. H. J. Res. 20 (85th Cong. 1st Sess.) is easily in this category. Its Section 1 reads:

> No citizen of the United States shall be compelled to serve in the Armed Forces of the United States in any foreign country unless Congress has declared war on that country.

Under such a dispensation our military personnel could not even be compelled to serve in the territory of an ally in preparing for or staging an attack on an enemy against whom Congress had declared war. It would be necessary to poll the battalion hoping, of course, that there would be crewmen, if not pilots for the planes, who would string along. We would be confined to the use of volunteers to man key installations outside our borders, no matter how vital those installations were to our national interests.

Some movements for constitutional change derive much of their force from public attitudes toward particular leaders. They are, in a word, *ad hominem*. The Twenty-Second Amendment was, in substantial part, a thrust at Franklin D. Roosevelt. He was a great leader who aroused strong feelings one way or the other. The move to restrict a president to two terms, originally aimed at Roosevelt, was not carried through until he was dead and beyond the reach of friend or foe. Now we find, in the current rash of proposed amendments, a proposal to repeal that amendment. There is no doubt that this, too, is *ad hominem;*

[11] COMMISSION ON INTERGOVERNMENTAL RELATIONS, REPORT TO THE PRESIDENT FOR TRANSMITTAL TO THE CONGRESS 38, 56–57 (1955).

it is urged by people who think that President Eisenhower is weakened by the absence of the possibility of a third term.

The attempts of recent years to place in the Constitution further limitations on the treaty power are, in part, *ad hominem*. Here, once more, the attack was inspired, in a measure, by antagonism to Franklin D. Roosevelt but, like the Twenty-Second Amendment, it has carried over to the present day.

In 1952 the Supreme Court determined by a divided vote in the *Steel Seizure Case* that the President lacked the power, absent enabling legislation, to seize private steel plants despite a potential emergency due to a strike.[12] There followed several proposals for constitutional amendment to spell out a limitation on executive authority—proposals which savored of the *ad hominem* approach. This time the Chief Executive was Harry S. Truman.

Undoubtedly experience during this or that administration may provide rational support for proposed constitutional change; but that should be a matter of ideas, not of personalities. We are not operating a banana republic.

There are a few proposals for constitutional change, affecting all three branches of the National Government, which have gained important lawyer support. I have in mind particularly proposals concerning the treaty power, the fiscal powers of Congress and the size, tenure of members and appellate jurisdiction of the Supreme Court. Attention will be invited to some of these not primarily on their merits as policy ideas, but in relation to American constitutionalism.

What has concerned me most in the discussion of and debate on such proposals has been the scant attention given, even by lawyers, to the important initial question whether the policies involved should be dealt with on the constitutional level at all. It may be that at a given time it would be wise policy to reduce income taxes, but that does not bespeak the withdrawal of policy reexamination from the legislative forum.

It is in the area of Congressional fiscal powers that proposed

[12] *Youngstown* v. *Sawyer*, 343 U. S. 579 (1952).

amendments become most specific in limitation of governmental authority. The principal tax limitation proposal is designed to take away from Congress the power to levy gift and succession taxes and so to confine the power to impose graduated income taxes as to fix a normal maximum rate of 25% and prevent, in any event, a greater spread than 15% between the lowest and highest rates.[13] This has the approval of the House of Delegates of the American Bar Association.

Proponents are concerned with tax policy. They desire elimination of high income tax brackets and of Federal gift and succession taxes. They are confident that, were the gift and succession tax field left entirely to the states, the tax slice of a substantial estate would be much less than at present. They contend that high taxes of these types stifle initiative and dry up the sources of private capital; this, they say, is just the way Marx expected the capitalistic system to bring about its own downfall. Whether these points have force as a matter of tax policy is not my present concern, any more than is the merit of a proposal that Congress stay stay out of the retail sales tax field. I do find it interesting that Marxist thinking as to what is bad for us is accepted by people who regard his positive ideas with horror. The point I am making is that tax policy should be hammered out at the legislative level.

The only express limitations placed by the original Constitution upon the taxing power of Congress were the requirements that direct taxes be apportioned among the states in accordance with population and that duties, imposts and excises be uniform throughout the United States, and a prohibition upon any tax or duty on exports from any state. The new nation moved this far in one step from the Articles of Confederation, which gave the central government no taxing power. Thus, at the very birth of the Federal Union the states and the people were prepared to place Federal tax policy broadly in representative hands.

During the Civil War, Congress resorted to an income tax.[14]

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[13] S. J. RES. 23, 84th Cong., 1st sess. (1955).
[14] Act of August 5, 1861, 12 STAT. 309 (1861).

This was a temporary policy; the tax did not become a continuing part of the revenue system. When challenged in the courts, it passed muster; the Supreme Court considered it reasonably clear that direct taxes were confined to capitation and ad valorem levies.[15] In 1894 Congress again levied an income tax.[16] An attack upon it in the courts in the *Pollock* case[17] was supported by much of the policy argumentation now employed in favor of further constitutional limitation of the taxing power; Joseph Choate called the tax "communistic."[18] The constitutional contention that prevailed was the curious one that a tax on the income from property is a direct tax because a tax on property is a direct tax and a tax on the income from property is indirectly a tax on that property! This decision was repudiated, one might say, by the Sixteenth Amendment.

The fundamental objection to a return to *Pollock* by constitutional amendment is that such a return would be an attack upon responsible self-government. If Congress cannot be trusted to determine the limits of income taxation, why entrust it with broad authority to impose sales taxes or tariffs, for example? The answer, of course, is not that it is less trustworthy as to the one tax than the other but that proponents of amendment want to nail down their views of tax policy in the organic law.

Former Congressman Hatton Summers of Texas put the matter extremely well in an informal statement before the House of Delegates of the American Bar Association:

> I doubt very seriously that a written Constitution is better than an unwritten Constitution, except with reference to some very fundamental things. It is a mistake to relieve any generation of the responsibility of being on its toes, recognizing always that eternal vigilance is the price of its liberty. It is a serious thing to cut off the generation that is to come after us from the necessity of exercising its

[15] *Springer* v. *United States*, 102 U. S. 586 (1881).
[16] Act of August 27, 1894, §27, 28 STAT. 509, 553 (1894).
[17] 157 U. S. 429 (1895); 158 U. S. 601 (1895).
[18] 157 U. S. 429, 532 (1895).

> own judgment with regard to a matter of current importance to them. When we change the Constitution we make it tremendously difficult for the succeeding generation to have the liberty of conduct on its own responsibility. . . .[19]

The notion that constitutional tax limitation is an effective restraint in the shaping of legislative policy as to public expenditure is delusive. If the organized community supports a policy, at a given time, which calls for public outlay, finance will be an ancillary matter. This is not to deride prudence but to recognize that the question of what is financially warranted is likely to be determined by the community as the occasion arises rather than by self-imposed constitutional limitations. Limitation upon one kind of taxation may bring about a shift in the incidence of taxation, but who is so bold as to assert that it will control governmental expenditure?

It is a matter of unhappy memory that the most violent challenge to American constitutionalism to be found in any version of the so-called Bricker Resolution on the treaty power emanated from the organized Bar.[20] I refer to the familiar provision of the 1953 version,[21] which reads as follows:

> SECTION 2. A treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of a treaty.

The proposal came out of the American Bar Association's Committee on Peace and Law through the United Nations.

It is not my intention to revive the larger controversy, but I do propose to point out some of the implications of that provision for the American constitutional system. An earlier version had called for Congressional legislation to give a treaty effect as do-

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[19] 79 REPS. AM. BAR ASS'N. 497 (1954).

[20] Statement by Frank E. Holman, *Treaties and Executive Agreements*, Hearings before a Subcommittee of the Committee on the Judiciary, United States Senate, 83rd Cong., 1st Sess., on S. J. Res. 1 and S. J. Res. 43, 129, 147 (1953).

[21] S. J. RES. 1, 83rd Cong., 1st Sess., as reported by the Committee on the Judiciary.

mestic law. It would not have permitted that effect to be achieved by self-executing treaty. The 1953 proposal went much further; what the bar association spokesmen contributed was the "which clause." That little clause of nine words would, if adopted, have denied the United States the authority to give a treaty domestic effect beyond the ordinary legislative power of Congress. The President and the Senate have, since the early days of the Republic, been making and ratifying treaties which, in domestic effect, have operated in state law areas. The familiar treaties of friendship, commerce and navigation have commonly overridden state law with respect to such matters as the capacity of an alien to own and inherit real property. Congress cannot independently legislate on matters of that character; they are state law grist. They are, however, subjects of general international concern in such a context as that of a treaty of friendship. If there were no power in the National Government to deal with them in the making or implementation of a treaty, the United States, in point of external or foreign affairs, would be less than sovereign.

In the debate in the Senate early in 1954, it soon became apparent that the "which clause" stood no chance of gaining approval. It was plainly an extreme proposal. Mr. Bricker himself came forward with a substitute draft innocent of the "which clause." The upshot was a resounding repudiation of the work of the bar association spokesmen, which, in the meantime, had been given the imprimatur of the House of Delegates at Boston.

Strangely enough the effect has not been very chastening. The slightest suggestion of consideration of a reversal of position meets with immediate resistance.

This record discloses what I consider to be a particularly grave default in lawyer leadership. It is tempered somewhat by the vigorous resistance to the attack on the treaty power of a number of state and local bar associations and of many individual lawyers. But the general public is more likely to associate the national bar organization position with the legal profession. Nor have I been able to find a satisfactory rational explanation for it. Sensitivity to the interests represented by lawyers does not ex-

plain it; impairment of freedom of international agreement by the National Government would hardly be calculated to promote business activity. The threadbare contention that there is now power to make a treaty which "cuts across the Bill of Rights" has no support in our constitutional interpretation and practice and does not ring true; it is pressed at the same time that live problems of individual liberty go unnoticed.

The explanation lies in human psychology and in bar association politics. We have already taken note of the *ad hominem* element. There is, in addition, the psychology of escape through self-limitation. This latter underlies a philosophy of "rigid constitutionalism," a philosophy of limitation or denial of power to prevent our representatives from hurting us by abuse of power. That philosophy is a destructive attack upon organic constitutionalism under which power is commensurate with responsibility and the ultimate safeguards are political checks and balances and a bill of rights.

There tends to be a party line in some bar associations on po litical issues with respect to which the organizations have taken official positions. This tends to suppress independent political utterance and action, especially by lawyers who are officers of the organization. I look upon this as an evil with a double aspect. It tends to deny the community the benefits of independent lawyer thought and it makes it difficult for lawyers of independent mind to achieve positions of top leadership in the organized bar.

In the debate on the Bricker Resolution which took place in the House of Delegates of the American Bar Association in Boston in 1953, leading proponents of the Bricker proposal simply put aside the reasoned objections made by the Association's Section on International and Comparative Law and those of the speakers in opposition on the House floor. Those proponents stood on the proposition that the Association would be criticized and lose face should it reverse its earlier stand favoring treaty power limitation.[28] I said then and I repeat here that there was a

[28] 78 REPS. AM. BAR ASS'N 143, 146 (1953).

great deal more at stake than the face of a professional organization; that we, as rational men trained in hard lawyer-like thinking, should confront the great public issue squarely. Certainly there is fresh occasion to say this.

At the 1957 mid-winter meeting of the House of Delegates, the Chairman of the Section of International and Comparative Law presented a committee report which reaffirmed the Section's opposition to the Bricker Resolution. The report was not even accepted by the House; it was tabled with only scattered dissenting votes.[23] The New York Times reported that members feared that "the report would be interpreted as a reversal of the previous position of the Association."[24] This is carrying the point to an extraordinary length; it means, as the Section chairman asserted, gag rule which would limit free discussion by lawyers. Fortunately it does not silence the individual lawyer. In this case it is especially noteworthy that the report emanated from that subject matter division of the Association within whose area of interest the matter lies and whose membership embraces most of the Association's students of the subject.

This is enough to make one consider joining forces with those who contend that the organized Bar should not take positions on matters of political import. Mature consideration should, however, lead very definitely to the rejection of such an idea. The answer is no more to be found in self-imposed silence than are the problems of the contemporary world to be met by erecting new constitutional limitations on governmental authority. The answer is, I maintain, to be found in a better performance by the organized Bar in discharging the responsibility it owes to the larger community to shed light on public questions.

In recent years proposed constitutional amendments designed to protect the independence of the Supreme Court and fortify the quality of its membership have been supported by lawyers of conspicuous ability and devotion to the public interest. So much do I respect them and their views that it makes me very unhappy

[23] 43 A. B. A. J. 375, 376 (April, 1957).
[24] N. Y. Times, Feb. 20, 1957, sec. 1, p. 15, col. 2.

to find myself in disagreement with them. It is not that I wish to debate with them as to the optimum size of the Court, for example. The issue is, again, a more fundamental matter of American constitutionalism. Is it the part of wisdom to try to guard against possible dangers to the Court as we now see them, in the light of past experience, by more or less specific constitutional provision? This I must answer in the negative.

Let us develop the subject in relation to specific proposals which have been put forward. The so-called Butler Amendment would effect four changes.[25] It would fix the membership of the Court at nine. It would make 75 the age of compulsory retirement. It would give the Court appellate jurisdiction, as to law and fact, of all cases arising under the Constitution and place that jurisdiction beyond Congressional exception or regulation. It would render a member of the Court ineligible to be President or Vice-President within five years after ceasing to be in regular active service on the Court.

The historical record, which is rather familiar lore to the legal profession, does not justify the concern which has been expressed. The size of the Court has not been changed since 1869.[26] The 1937 "Court Plan" experience disclosed the great strength of the Court as a politico-legal institution. That strength, enjoyed a century and a half after the founding of the Republic, is far more significant than any rigid specification of number of justices that we might make.

What is there of recent memory to support the compulsory retirement proposal? What problem case has there been since Congress made appropriate financial provision for voluntary retirement?[27]

In *Ex parte McCardle*,[28] there was an example of Congressional action, the object of which was to deprive the Court of appellate jurisdiction in a pending case. That was in 1869. There has been

[25] S. J. RES. 45, 84th Cong., 1st Sess. (1955). See John R. Schmidhauser, *The Butler Amendment; An Analysis by a Non-Lawyer*, 43 A. B. A. J. 714 (1957).

[26] The number was restored to nine by Act of April 10, 1869, 16 STAT. 44.

[27] See 45 STAT. 1422 (1929); 50 STAT. 24 (1950); 28 U. S. C. A. §371.

[28] 74 U. S. (7 Wall.) 506 (1868).

nothing comparable since. Surely there are more lively problems to engage our attention, even if it be assumed that Congressional power to limit the Court's appellate jurisdiction goes far enough to prevent, outright, review by it of constitutional questions. Constitutional amendment designed to prevent possible, but extremely unlikely, abuse of governmental power is not the way to strengthen our institutions and legal processes. It is essentially a negative approach, and in that sense the Butler Amendment has a kinship with the Bricker Resolution.

Not since Charles Evans Hughes resigned from the Court in 1916 to run for President has there been an instance of a justice actually entering the political lists where the prize was the Presidency or Vice-Presidency.[29] It must be granted, however, that the objection to the present eligibility of a justice to run for high executive office cuts deeper; it goes to the effect upon a judge, as a judge, produced by his nurturing political ambitions and to the effect on the public mind of discussion of him as a possible candidate. The objection has force and I would not resist the incorporation of this single feature of the Butler Amendment into the Constitution.

In our political and legal system, it is a cardinal proposition that the independence of the judiciary, and especially of the Supreme Court of the United States, must be maintained. This, however, is not simply a fancy abstraction; it is both a principle and a working idea which operates in a government of divided authority involving a a complex and delicate system of checks and balances. A statute deliberately aimed at denying the Supreme Court appellate jurisdiction in a case involving the constitutionality of the Reconstruction Acts is one thing; a broad political restraint upon or counter balance of the judiciary by one or the other or both of the political branches of the Government is quite another. It seems to me, that in the course of our

[29] More recently, the name of Justice Douglas was prominent in political discussion of the vice-presidency in 1944 and people were, a year or so ago, speculating about Chief Justice Warren in relation to the presidency. This is not to assert that either was interested or gave the idea any encouragement.

constitutional history, we have achieved a rather extraordinary degree of independence for that arm of the Government which has the final voice as to the meaning of most of the Constitution. Is it not better to rely upon this very genuine traditional independence than to tinker with a well-adjusted system of separation of powers in order to forestall possible future legislative attacks upon the Court?

Out of the current tension, generated largely by resistance to the public school desegregation decisions, have come several proposals to curb the Court. There is, for example, a proposed constitutional amendment designed to make membership on the Court elective for a twelve-year term. This measure is an attack upon a cherished feature of the Federal judicial system—the appointment, with life tenure on good behavior, of the judges of constitutional courts. It is doubtless intended to make the judges more responsive to public opinion. In a larger sense, it is not to be assumed that the Court is insensitive to the state of the public mind, but to bring the Court within the realm of practical politics would be to affect adversely the detachment essential to its unique role as arbiter of the Federal System and would very likely lower the quality of its membership.

When Mr. Justice Holmes declared that the Union would be imperiled if the Court lost its power of judicial review of state legislation, he was expressing a view which I fully embrace.[20] It is interesting, at the same time, that the current resistance to Federal authority arises from the very action of the Court in passing adversely upon the constitutionality of state legislation and action pursuant to it.

It is not surprising that the principal strain upon the Federal system at the present time comes from a controversy about human rights. It does credit to the legal profession that in recent years the Supreme Court has given new vitality to the constitutional safeguards for those aspects of human liberty which embrace freedom of the mind, freedom of conscience, freedom of

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[20] COLLECTED LEGAL PAPERS 295, 296 (1920).

the person and equality before the law. This is a great credit to the profession, both because of the lawyers who successfully spoke up for human rights in the courts, and because of those men of the profession elevated to the Bench who gave judicial recognition to those rights.

At the present time we are confronted with a moral and political crisis of the first order arising out of resistance to the according of the equal protection of the laws to Negro children as public school pupils. Let us try to set this situation in perspective and then examine the Bar's responsibilities in relation to it. Here I speak, without reservation, as to the merits.

The Fourteenth Amendment articulated high ideals which our society proved itself unable to approach, let alone achieve, during the years following its adoption. The cultural lag in both the white and Negro races and the problem of psychological accommodation were a little too much. When the equal protection ideal was invoked as to public passenger transportation in 1896,[21] we were still not up to full practical recognition of the principle of non-discrimination. Neither race had had enough time. Our Negro citizens had enjoyed free status the country over for only a little over three decades. The South had not recovered from the devastating experience of the War and Reconstruction.

During the three generations which have intervened, social change both in this country and the world at large has undoubtedly been the most rapid in the history of civilization. Nothing is clearer throughout the world today than that racial subservience and colonialism are on their last legs. As a significant number of our Negro citizens have demonstrated so tellingly in the arts, in public affairs, in scholarship and in the world of sports, it is individual merit that counts, not racial or other group differences. The moral force of this is irresistible. The colored races know this and justly will not long suffer a position of subservience, no matter how benevolent the dispensation.

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[21] *Plessy* v. *Ferguson*, 163 U. S. 537.

This being the state of affairs, it is not only morally and legally insupportable to defend racial segregation along the separate but equal lines, but also foolhardy from the standpoint of national interest. In saying this I do not condemn the South or any other area out of hand. The incidence of the problem is not confined to one section, nor is the responsibility for meeting it.

This is not to minimize the complex, economic, social and psychological difficulties in the path of racial desegregation. It is, however, to suggest that the demands upon American leadership in the achievement of comparatively rapid and orderly realization of racial desegregation are of the highest order of priority.

In adequate perspective, the suggestion that when the Court departed from the separate but equal doctrine in the public school desegregation cases in 1954,[32] it was, in effect, amending the Constitution is not well taken. We do not have a rigid doctrine of stare decisis which stands athwart the overruling of decisions on constitutional questions. Constitutional interpretation, moreover, is not a matter of catholic reach or definitive certainty in which each decision stands apart. Rather, it is a developing process in which ideas emerge and take shape. Our experience with the equal protection clause affords a very good example of this. The action of the Supreme Court in embracing the separate but equal doctrine in *Plessy* v. *Ferguson* in 1896[33] was a step in an emerging development. It was a compromise set in the restricting cultural context. Today there is still a serious cultural and psychological lag, but we have gone far enough that it is plain to me that continued adherence to the separate but equal compromise would, in the world view, be no better than moral drift. The decisions of the Court in the public school desegregation cases declared an end to this compromise of principle. It is my prediction that they will stand, in the perspective of history, as government's nearest approach in our time to the Amreican ideal of individual freedom and equal treatment under law.

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[32] *Brown* v. *Board of Education*, 347 U. S. 483 (1954); *Bolling* v. *Sharp*, 347 U. S. 497 (1954).

[33] *Supra* note 31.

Meanwhile, regardless of one's views as to the merits of these decisions, there is the immediate problem of giving effect to the supreme law of the land as it has been authoritatively interpreted. It is in this area of public affairs that leadership of lawyers is now so critically needed. They know that the only ways to reverse the Court's interpretation within the constitutional framework are constitutional amendment and overruling decision. They have the understanding and the power of communication to supply the sorely needed rational element in a social situation highly charged with emotion.

It is, accordingly, my suggestion that there be established a national lawyer group or unit on human rights—preferably as a section of the American Bar Association—which would be concerned with matters of substance and procedure bearing upon the realization within our political and legal system of the basic values associated with human individuality. These embrace both the freedom of the individual and equality of treatment in society.

I am sure that there are many able members of the profession who would happily devote themselves to the work of such a group; what they need is an appropriate framework within which to contribute their efforts.

Such a unit would have the potential of leadership in problems of racial desegregation through bi-racial and trans-sectional participation in study and discussion of the subject. If the national organization provided effective leadership in this respect, it is not unlikely that many state and local bar groups would follow its lead.

Here, as in the provision of counsel for unpoular persons and causes, the courageous individual lawyer needs the backing of the organized Bar. This renders it doubly important that the organized profession actively support the supremacy of the law and legal processes. The national bar organization can rise to the occasion by declaring itself in principle and by creating an appropriate unit to promote understanding of and conformity with the rule of law. This is a minimum program.

In my view the organized bar should do a great deal more; it

should exert itself vigorously in the field of human rights. It must be granted that the recent record is not encouraging. This is not to overlook the commendable work the American Bar Association has done in behalf of fair procedure in administrative proceedings and legislative investigation and its affirmation in broad terms of the right to counsel. The Association's Bill of Rights Committee, moreover, was characterized by a lively concern for civil liberty in the years just prior to World War II. Beginning in 1940, it produced two volumes of a valuable quarterly, *The Bill of Rights Review*. This was a real contribution, but in the security-minded period during and following the War the *Review* has not been continued. In the post-war years attention has been drawn so strongly to security matters that an exaggerated imbalance has been observable.

During this time the national organization has, on occasion, ranged itself with the Philistines. Its principal voice in this respect has been the Committee on Communist Strategy, Tactics and Objectives. A particularly painful example was an Association effort, through that Committee, to have a lawyer disbarred on the ground that he invoked his constitutional privilege against self-incrimination when asked in a Congressional investigation and subsequent disciplinary proceedings about Communist party membership. The Supreme Court of Florida determined that disbarment on such a basis without any evidence connecting him with Communist activities would deny due process.[34] Here the organized Bar, instead of setting an example of dedication to due process and providing guidance to the public as to the meaning of the Fifth Amendment was attempting to apply a severe sanction against the assertion by a member of the profession of his constitutional rights.

The point that must be made with overwhelming emphasis is that justice and human liberty, not political security, are the supreme concerns of the lawyer and the profession as such. Organized society has its security problems but for lawyers as lawyers

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[34] *Sheiner* v. *State of Florida*, 82 So. 2d 657 (1955).

to be preoccupied with them is more than likely to compromise their devotion to civil liberty. What the organized Bar needs is not its own witch-hunting department but units dedicated to the guardianship of human rights. A ceremonial interest in the Bill of Rights will not supply the need.

Surely it must be recognized that the community's needs simply cry for more vision and more positive leadership in the organized legal profession. There are many men and women of the law who have the requisite qualities of mind and spirit. If they would but assert themselves the whole tone of the public influence of the Bar could be lifted tremendously. It gives me much pleasure to say that I look upon the Association of the Bar of the City of New York as a shining example in this respect. In the character of its leadership, in the intellectual quality of its consideration of lawyer and public questions and in the breadth of view achieved in its work it has no equal.

In the longer view I see the leadership responsibilities of the legal profession as a challenge of the highest order to general and to legal education. One of the most encouraging elements in the total situation is that many law schools are now girding themselves to achieve a new level of excellence in the breadth and intensity of legal education. Formal legal education is or should be training to develop basic intellectual competence—a deep-running capacity more vital and durable than technical knowledge or skill. Society's leadership demands call for education of this quality in a wide perspective—a perspective, once gained, that will sharpen the student's sense of individual and social values and will enable him to achieve an overview in his later professional service, no matter how special the client interest he may represent.

I do not consider it an exaggeration to say that the margin between the effective preservation and nurturing of American values in this nuclear age and the failure of the American way may well depend upon the quality of basic training for leadership afforded prospective lawyers. I am not suggesting that you can custom-make leaders any more than you can deliberately secure hap-

piness. The point is that the kind of legal education to which I have referred, when erected on a base of broad general education, is calculated to provide the needed development for people with the requisite native abilities; it is a fair assumption that there will be a goodly share of them in the student bodies of law schools with high admission standards.

The critical observations which I have made proceed basically from a deep sense of pride in the legal profession. In calling attention to what I consider to be deficiencies in the response of the Bar to the community's needs for public leadership, I have been moved by the desire to stimulate, at least in a small way, the more effective realization of the lawyer's potential for leadership. Pride in the splendid tradition and the great accomplishments of the profession should move one not to complacency but to stern scrutiny of our response to the human problems of today and emerging tomorrow. It is certain that what I have said will meet with strong and honest challenge by many minds. That is wholesome. I have been guided by the earnest conviction that the points I have made needed to be made, and I stand upon them as one who is proud of his profession and deeply concerned for its future.

Committee Reports

FINAL REPORT OF THE SPECIAL COMMITTEE ON THE FAMILY PART OF THE SUPREME COURT

THE RESULTS OF AN EXPERIMENT

This is a report on a successful experiment in the administration of justice.

The questions posed were:

> (1) Would the handling of matrimonial and custody disputes be improved if such proceedings were centralized in a single Part of the Supreme Court?
>
> (2) Would the handling of such proceedings be improved if the Court utilized the services of persons trained in case work, medicine, psychiatry and allied disciplines?

Answers to these questions were sought, not philosophically, but through actual test.

The Appellate Division, First Department, directed the centralized handling of family disputes for a two year period by adopting a new rule, Rule VIII-a, to be applicable to the Supreme Court, New York County and effective from September 1, 1955 until August 31, 1957. The Rule created Special Term, Part XII,

> " * * * to be known as the Family Part, for the call and consideration of all matrimonial actions and for the hearing and determination of all motions connected with matrimonial actions or matters or involving the custody and maintenance of infants. * * * " (The full text of the Rule appears in the appendix.)

Before this Rule was adopted, handling of family disputes was not centralized. Motions or writs in such cases were heard by justices in the motion parts; cases were assigned for trial by Special Term, Part III, to any of the special terms for trial which were open; proceedings relating to custody and visitation of children were determined in Special Term, Part II. Whether or not the new Rule would be made permanent after the two-year trial period was to depend on whether, in the opinion of the Court, it had resulted in an improvement over the former practice.

Arranging a test of the usefulness of casework and similar auxiliary services was more difficult because needed funds were not available in the Court's budget. Through the ingenuity of Presiding Justice David W. Peck and funds generously given by The Doris Duke Foundation, however, the obstacles were overcome. This Association, and particularly this specially appointed Committee, was entrusted with the task of administering the funds so as to provide the Court with the services whose value was to be tested.

The Committee retained a professionally trained and experienced caseworker and offered her services to the Court. The Court accepted this offer and provided the caseworker with an office. Physicians, psychiatrists and

psychologists were consulted on particular cases and paid by the Committee. Whether or not these auxiliary services would become permanent adjuncts to the Court was to depend again on whether, in the Court's opinion, they resulted in more successful disposition of family disputes.

After observing the operations of both the Family Part and its auxiliary services for a year, this Committee reported[1] last January that they should be continued. It recommended (1) that the Family Part be made permanent, and (2) that the Court acquire its own staff of caseworkers and make provision in its budget for medical and psychiatric consultation. Both recommendations were adopted. Rule VIII-a has been made permanent, and as of July 1, 1957 the Court acquired its own staff of two caseworkers and made provision in its budget for professional consultation.

There are, as might be expected, various administrative and legal questions still to be answered on the operation of the Family Part and its auxiliary services. Indeed, these services have yet to be used in a number of areas where they may prove useful. We discuss some of these matters in this report, and we urge that they be taken up with energy and imagination. But the fact there is still work to be done does not detract from the results which have been achieved. The basic questions posed have been affirmatively answered, and the experiment itself demonstrates a practical and flexible technique for testing proposals for improvement in judicial administration.

THE FAMILY PART IN OPERATION

THE BUSINESS OF THE PART

The Family Part serves as a clearing house for all family matters. To that Part come in the first instance all actions for divorce, annulment, separation, dissolution of a marriage and *habeas corpus* proceedings to determine legal custody of minor children. The Part handles all motions in matrimonial actions and all *habeas corpus* proceedings. It tries as many of the contested matrimonial cases as other business permits. The undefended matrimonial actions are heard by official referees to whom the cases are sent from the Family Part. Contested cases which are not tried in the Family Part are assigned for trial by Trial Term, Part II, and contested motions are from time to time referred to referees to take evidence and report.

Presiding over the Part at any given time is one of a rotating group of Supreme Court justices. A justice's service in the Part lasts for a one month term.

The following schedules show the volume and nature of family disputes handled by the Court during the two-year "experimental" period of the Family Part's existence. Actually, the first "year" was only ten months—from September 1, 1955 through June 30, 1956. But the two missing months were the vacation months of July and August when business is light so we believe that the periods are roughly comparable.

[1] The Committee's earlier report was printed in THE RECORD of The Association of the Bar of the City of New York, Vol. 12, No. 2, Feb. 1957 at p. 89, *et seq*. We have incorporated here some of the material in the earlier report.

SCHEDULE 1

CONTESTED ACTIONS AND PROCEEDINGS

(September 1, 1955 through June 30, 1957)

	Annulment Period ending		Divorce Period ending		Separation Period ending		Habeas Corpus Period ending		Miscellaneous Period ending		Total Period ending	
	6/30/56	6/30/57	6/30/56	6/30/57	6/30/56	6/30/57	6/30/56	6/30/57	6/30/56	6/30/57	6/30/56	6/30/57
Tried Special Term Part XII	38	49	37	29	78	55	53	49	5	5	211	187
Tried Other Special and Trial Term Parts	21	15	25	9	55	20	0	0	3	0	104	44
Total Causes Tried	59	64	62	38	133	75	53	49	8	5	315	231
Discontinued Special Term Part XII	6	7	7	8	56	35	0	18	1	0	70	68
Discontinued Other Parts	1	2	4	2	11	11	0	0	0	0	16	15
Total Causes Discontinued	7	9	11	10	67	46	0	18	1	0	86	83
Marked Off Special Term Part XII	4	15	3	14	14	25	0	40	0	0	21	94
Marked Off Trial Term Part II	0	4	0	5	0	8	0	0	3	0	3	17
Total Causes Marked Off	4	19	3	19	14	33	0	40	3	0	24	111
Transferred to Bronx	0		0		2		0		1		3	
Total Causes Disposed of	70	92	76	67	216	154	53	107	13	5	428	425

NOTE: The *habeas corpus* custody proceedings are ordinarily not included, for statistical purposes, with the matrimonial actions. No fee is paid for the filing of a *habeas corpus* petition, and the proceeding is not placed upon the calendars as an action would be. Since there are usually hearings at which testimony is taken, however, it seemed appropriate to include the proceedings here rather than to class them with motions or in a separate category.

SCHEDULE 2

UNCONTESTED MATRIMONIAL CAUSES HEARD BY REFEREES AND JUSTICES

	Period ending	
	6/30/56	6/30/57
Annulment	444	406
Divorce	578	742
Separation	32	31
Dissolution	89	117
Total	1,143	1,296

SCHEDULE 3

LITIGATED MOTIONS

	Period ending	
	6/30/56	6/30/57
Submitted or argued	648	1,255
Withdrawn or marked off	95	167
Total	743	1,422
Granted	511	827
Denied	117	290
Withdrawn after submission	20	138
Total	648	1,255
Alimony, Support, Counsel Fee	375	409
Contempt	60*	207
Custody	15	16
Miscellaneous	198	623
Total	648	1,255

* This figure is misleadingly low because for the first few months motions to punish for contempt continued to be brought at Special Term, Part I, and those figures are not included here.

SCHEDULE 4

ANALYSIS OF COURTROOM TIME

	Period ending	
	6/30/56	6/30/57
	Hours	Hours
Calendar Matters	159	212
Habeas Corpus	164	197
Trials	198	142
Reconciliation Conferences	55	14
Total	576	565

NOTES: The time spent on Calendar Matters includes such argument as takes place on motions. The remarkably low figure for time spent on Trials results principally from the fact that there is often no real dispute although the proceedings are technically contested ones. Trials that promise to be lengthy are ordinarily sent to Trial Term, Part II for assignment to another Part for trial.

AUXILIARY SERVICES

The creation of the Family Part was a recognition that family cases are different from other cases. The proposal to examine the usefulness of psychiatric, medical and social work skills was a recognition that in family cases non-legal considerations, particularly emotional ones, were often of major importance. A judge's understanding of the emotional aspects of such cases would clearly be improved if he could obtain the advice of an expert in the field—a skilled caseworker, psychologist or psychiatrist.

It became the first and principal task of this Committee to make available to the new Family Part medical, psychiatric and social work services of a high quality using the funds provided for this purpose by The Doris Duke Foundation.

The Committee considered in the first instance obtaining social work services from existing agencies on a contract basis. It decided, however, that the experiment would be more fruitful and informative if a qualified caseworker could be obtained for the Family Part on a full time basis. This decision, of course, made it critically important to find the right person—one who possessed not only great professional skill but who possessed also a personality which would permit successful cooperation with a variety of different justices while creating in actuality a new arm of the court.

After consultation with the justices, the Committee retained Mrs. Sylvia L. Golomb, who, as we noted above, is a professionally educated and experienced social worker and who has achieved an outstanding success. Mrs. Golomb adopted the name Family Counselling Unit to describe the entity which she, together with a part time stenographer, then became.

Generally speaking, it was Mrs. Golomb's assigned function to assist a

justice adjudicating a family dispute with such use of her professional skills as he and she thought most helpful. Most frequently this meant that she made an investigation of the case referred to her and rendered a report to the justice concerned. In the course of her investigation she interviewed the parties, the attorneys, relatives, friends and in fact all persons who appeared to be playing an important role in the situation. Depending upon the complexity of the case, these interviews might be exceedingly numerous and involve many hours of interviewing and telephoning. When a case called for it, she arranged for psychological testing or medical or psychiatric consultation. She also inquired as to whether any of the parties have had any previous contact with a social service agency. If so, she utilized such findings as were available through the Social Service Exchange which acts as a clearing house for social service agencies.

Following her investigation, Mrs. Golomb ordinarily renderd a report to the justice who had the case before him. Her report, supplemented by reports from any psychologists or psychiatrists who had been consulted, reflected Mrs. Golomb's professional insight into the case and the disposition which she believed should be made. These reports often suggested the desirability of referring the parties and their children to a social service agency for consultation and treatment.

In the course of her investigation, Mrs. Golomb also explored the possibility of reconciliation or settlement of the dispute. Even when no settlement could be achieved, she reported that oftentimes the bitterness between the parties was alleviated in part as a result of her discussions.

In addition to referring people to psychologists, physicians or psychiatrists, in connection with her own investigation Mrs. Golomb has had frequent occasion to refer the parties to social service agencies or private therapists for actual treatment. In the second year of the Family Part's operation she made 20 such referrals in the 53 cases in which she participated.

The nature of the problems referred to the Family Counselling Unit appears on Schedule 5 below. Schedule 6 lists referrals to outside professionals or agencies.

SCHEDULE 5

CASES REFERRED TO FAMILY COUNSELLING UNIT

July 1, 1956—June 30, 1957

Type	Number
Marital	4
Custody	37
Visitation	10
Miscellaneous	2
Total	53

SCHEDULE 6

USE OF OUTSIDE SERVICES

July 1, 1956—June 30, 1957

Nature of Referral	Number
Psychological tests	18
Psychiatric consultation	7
Medical examination	6
Long term treatment (agency or private therapist)	20
Total	51

As the justices and court personnel became aware of the availability of Mrs. Golomb's services, her work load increased rapidly. It became apparent that at least one additional caseworker would have to be provided if those services were to be made available to all justices wishing to use them. The work load became so great during the second year of the Part's operation that she was unable to take on additional cases which would otherwise have been referred to her. For this reason, two justices used outside agencies.

As the Committee was made aware of Mrs. Golomb's increasing work load, it undertook to obtain an additional caseworker for the Family Counselling Unit. The Committee recommended two applicants to the panel of Family Part justices but neither of them was approved. No reason for the lack of approval was given to us but we believe that the justices thought neither of the applicants whom we recommended provided sufficient religious diversification for the casework staff. This incident raises the overall social question of the weight to be given religious affiliation, race and national origin in selecting personnel, a question which extends beyond the narrow field of this Committee's special endeavor. Whatever weight is to be given these factors, it is our unanimous opinion that the Court should insist in every instance that persons selected for its casework staff satisfy high standards of professional competence.

As of July 1 of this year when the Court assumed responsibility for providing its own staff of caseworkers, a second caseworker was hired by the Court to assist Mrs. Golomb. The Committee has not had an opportunity to meet with her or to observe her work.

The Committee is satisfied that Mrs. Golomb's investigations and her reports have both been effective contributions to the disposition of the cases concerned. The justices have reported to us that they found the reports useful contributions to their understanding of the cases before them. Indeed, the fact that the referrals to Mrs. Golomb became so numerous that she was for certain periods unable to take additional cases, is ample evidence that the justices have found her useful.

THE JUSTICES PRESIDING

It was originally thought that a justice assigned to the Part would serve for several consecutive months. It soon became apparent, however, that because of the large volume and emotional strain of the work, long assignments were undesirable. Accordingly, as we mentioned above, justices have been assigned to preside in the Part on a monthly rotating basis. In the first instance these assignments were limited to six judges and it was contemplated that nearly every judge would serve two terms during the year, no assignments being made for the months of July and August. After consultation with the judges, however, this Committee recommended that ten justices be assigned to Family Part duty, each to serve one month a year. This recommendation was adopted, and ten judges were assigned to the Part for the calendar year 1957. In the two years through June 30, 1957 the following justices had presided in the Family Part, most of them for several terms:

Samuel M. Gold
Matthew M. Levy
Owen McGivern
Walter A. Lynch
Vincent A. Lupiano
Arthur Markewich
Henry Epstein

The justices have varied greatly in their use of the auxiliary services provided by the Committee. Mrs. Golomb reports that during the second year of the Family Part's operation, the number of cases referred to her for an investigation and report ranged all the way from two for some justices to 21 for a single justice. Some justices conferred with Mrs. Golomb about cases without requiring an investigation, and she was also asked to attend hearings. The justices have been unanimous in stating that Mrs. Golomb and the other auxiliary services have been useful to them.

The justices have also been unanimous in stating that the assignment to the Family Part is an arduous one, both because of the volume of work and its emotional nature. They agree, however, that the handling of matrimonial matters is more efficient under the centralized Family Part. Members of the staff of the Family Part report that they have seen a marked improvement in the handling of cases by the Family Part justices as they have acquired more experience—an improvement, that is, in speed and facility of disposition. They express the belief that increased specialization has enabled the Family Part justices to elicit more promptly the testimony and proof on vital issues and to eliminate a good deal of time-consuming, unimportant testimony. The justices themselves report that they have found the work of Part somewhat less burdensome as they have served succeeding terms, confirming the view that experience and specialization have increased their capability with this type of work.

In order to take advantage of the specialized ability of the Family Part justices, the Committee at one time recommended that cases involving children which were not disposed of in the Family Part should be assigned for

trial to parts presided over by justices who had had Family Part experience. The Court took no action on this recommendation. The Committee does not renew it because both experience and further consideration indicate that the present system has its own advantages, among them the more efficient operation of the Calendar Part and the opportunity for non-Family Part justices, in trying occasional family cases, to use a caseworker's services.

ATTORNEYS

After the Family Part had completed its first year of operation, this Committee took a poll of attorneys who had participated in the cases referred to Mrs. Golomb. Thirty attorneys were questioned and each was asked whether or not he favored continuing the use of a social worker in the Family Part. Four declined to comment because their contact with the social worker had been so slight. Of the remaining 26, only two were not in favor of continuing the services. Eighteen favored continuation without qualification and their comments were most enthusiastic. One attorney stated that he had not understood his own client until after the investigation; another thought that in *habeas corpus* proceedings an investigation by a social worker should be begun as soon as the petition was filed; others commented that the service was "excellent," "very important," or "should be increased."

Six other attorneys were recorded as generally favoring a continuation of the services but with qualifications. Two attorneys were critical of Mrs. Golomb's effectiveness. One thought that time was grievously wasted in using the services to effect a reconciliation; one thought that the parties should have an opportunity to rebut matters contained in the social worker's report; one thought the social worker's function should be limited to reporting on facts without recommendations and one thought the services should prove useful but had not helped in his particular case. It appears, therefore, that the attorneys who have had the greatest experience with the use of the services overwhelmingly favor their continuance. Since the survey included the attorneys whose clients were unsuccessful in Family Part proceedings, we read the results as a warm endorsement of the worth of social casework services in this Court. The reactions are also a tribute to Mrs. Golomb's effectiveness.

Mrs. Golomb reports that most attorneys were cooperative and helpful. Some rendered a real service in persuading recalcitrant or frightened clients to cooperate in the investigation. In many cases attorneys were helpful in interpreting the decision to their clients and reconciling them to it.

These comments do not apply to all attorneys. A small minority was antagonistic to the caseworker, making her task more difficult and the results less beneficial.

COURT PERSONNEL

Mrs. Golomb reports that she was greatly helped by the highly cooperative attitude of all Court personnel, especially the staff at the Family Part. The clerks often briefed her on cases about to be assigned to her, summarized

developments in hearings she was unable to attend because of prior commitments, and made constructive suggestions about the improvement of the service. Harmonious and helpful relations were maintained with all the secretaries of the many judges serviced.

UNFINISHED BUSINESS

LEGAL STATUS OF AUXILIARY SERVICES

There is no specific statutory authority for an investigation of the kind Mrs. Golomb has been conducting. Nor is there any statutory definition of the effect of her report. Because of the desirability of encouraging parties to talk freely to Mrs. Golomb and to psychologists or psychiatrists to whom they were referred, the Committee has thought that Mrs. Golomb's report should be for the confidential use of the Court only. On occasion some justices have discussed the report with attorneys for the parties.

This procedure has operated with the consent of the parties. The use of the consent technique has worked satisfactorily for the purposes of our experiment. Nevertheless there have been difficulties with it even during the experimental period. In some instances consents have been refused, in others they have been withdrawn, and in still others there have been disputes as to the scope of the consent.

The Committee has been aware that if the use of auxiliary services is to continue, there will have to be statutory provision therefor. Research on this subject has been done by a student at the Columbia University School of Law who has offered to continue his work and make his findings available.

REFERRALS

In the early stages of the experiment, Mrs. Golomb reported difficulty in obtaining promptly appointments for psychological testing and psychiatric consultation. She reports now, however, that this situation has improved and that she has made satisfactory arrangements with qualified persons in these professions, insuring reasonable speed in handling referrals.

Problems continue with regard to referrals for longterm treatment. Most of these referrals are made following a decree, and there is often difficulty seeing to it that the parties actually cooperate with the agency to which they are referred. The Family Counselling Unit's responsibility and authority to enforce decretal provisions of this nature are not clear.

In addition, there is an overall shortage of agency resources and facilities, and the agencies to which the parties are referred are often overcrowded, with long delays ensuing before the treatment can begin. Such delays obviously may be harmful to emotionally disturbed persons.

RECONCILIATION

One of the original objects which it was hoped that the creation of the Family Part would achieve was an increase in reconciliations in matrimonial disputes. At the outset the justices presiding in the Part devoted long hours

to reconciliation conferences. Few reconciliations were obtained, however, and the justices have reported unanimously that strenuous efforts in this direction are simply not worthwhile at present.

It is thought that a principal handicap in achieving the proper atmosphere for a reconciliation is the bitterness engendered in the parties by the preparation of pleadings and affidavits on motions for temporary alimony and counsel fees. These papers sworn to by the parties seem to harden their hostile feelings toward each other. This Committee proposed an amendment to Rule VIII-a which would have, in effect, preferred cases in which the parties had sought a reconciliation conference prior to the service of pleadings. The suggestion has been discussed with justices on the Family Part Panel but no steps have been taken to activate it. The Committee believes that efforts should be made to encourage reconciliation conferences prior to the service of pleadings. Experience in other jurisdictions underlines the need for early, systematic and intensive efforts at conciliation if disintegrating marriages are to be helped.

PROCEDURAL DELAYS

One adverse side effect of the use of auxiliary services has been the resulting procedural delays. It takes time for a caseworker to conduct an investigation; it takes time to arrange for psychological testing, psychiatric consultation, etc. In the ordinary case the court proceeding itself may be upsetting to individuals who are already highly emotionally charged. Obviously a delay in bring the proceeding to an end is undesirable. The Committee thinks that efforts should be made to screen cases at the first possible opportunity to determine whether an investigation is desirable. This should result in starting such an investigation earlier in the chronology of the court proceeding and should lessen the resulting delay in final disposition.

AREA OF USEFULNESS OF AUXILIARY SERVICES

As appears from Schedule 5, almost all the cases being referred to the Family Counselling Unit have involved custody or visitation rights as the principal issue. The Committee had hoped that during the experimental period the use of the caseworker's services might be broadened into other areas, and this was one of the principal reasons behind our efforts to obtain a second caseworker. Since it was not possible to obtain a second caseworker satisfactory to the Court during that period however, Mrs. Golomb's efforts remained centered in the custody and visitation area.

A useful role might be played by a caseworker in alimony contests and reconciliation and settlement efforts. Experimental operations should be conducted in those areas. It might be considered also whether uncontested cases should be screened to see whether some investigation should be made, particularly where the welfare of children is involved.

It has been suggested that the caseworker might play a useful role in the

supervision and enforcement of decrees. Force is lent to the suggestion by some unsatisfactory results, reported above, in connection with referrals to social agencies. But the suggestion contemplates that the Court abandon its traditional adjudicative function and take an active part in working out with the parties their adjustment to their new, complex relationship. Such a departure from the Court's accustomed role requires most careful study. We believe that the problem should be taken firmly in hand and consideration given to whether insight could be gained through the same practical kind of inquiry which is the foundation for this report.

STANDARDS FOR CASEWORK STAFF

We set forth above the Committee's view that personnel of the casework staff should meet high professional standards. At a time when the Committee was seeking an assistant for Mrs. Golomb, a subcommittee drew up a set of such standards. No official action was taken on the proposed standards. We think that standards should be adopted by the Court for positions on its casework staff and that the standards developed by our subcommittee represent minimum desirable standards for these important posts.

RECOMMENDATIONS

As we have just pointed out, there are many questions relating to the Family Part and the operation of its auxiliary services which merit serious consideration. Proposals for legislative action are indicated in some areas. We believe that this Association can and should offer its services to the Court to help in resolving the unanswered questions and supporting desirable legislation.

Accordingly, we recommend to the Executive Committee of this Association that a special committee be appointed to cooperate with the Family Part of the Supreme Court, New York County. We believe that the committee should consist of members of the Bar and representatives of the casework and psychiatric professions.

The justices of the Court have been highly cooperative and helpful to us. They have welcomed suggestions and given freely of their time in conferring with us. We believe that any future committee can look forward to the same lively cooperation.

Respectfully submitted,

MERRELL E. CLARK, JR., *Chairman*,
HOWARD REID CRAIG,
JOHN F. DOOLING, JR.,
SAMUEL M. GOLD,
PHILIP G. HULL,
JACOB L. ISAACS,
MADELEINE LAY,
KATHERINE MCELROY,
RICHARD G. MOSER,
MAURICE ROSENBERG,
HOWARD HILTON SPELLMAN.

November 7, 1957

APPENDIX

Rule VIII-a. Special Term for matrimonial causes and related family litigation. There shall be a Special Term, Part XII, of the Supreme Court, New York County, to be known as the Family Part, for the call and consideration of all matrimonial actions and for the hearing and determination of all motions connected with matrimonial actions or matters or involving the custody and maintenance of infants. It is the intent and purpose of this rule to have all phases of matrimonial or child custody litigation in the Supreme Court, New York County, considered by the justice holding the Family Part.

All motions and applications referable to the Family Part under this rule and returnable under the rules at any Special Term shall be referred to the justice holding the Family Part for disposition. The clerk of any such Special Term shall so mark such motions and applications.

The calendar clerk of the Special Term for Trials shall make up from the causes on the general calendar a calendar of all matrimonial causes noticed for trial at Special Term, including but not limited to any actions for divorce, annulment or separation and applications for declaratory judgments or injunctive relief based on matrimonial status. Such calendar shall be called in the Family Part on the first Monday of each Term under the direction of the justice holding the Family Part.

Upon the receipt of the initial motion in any action or proceeding referable to the Family Part, or upon the call of the trial calendar of cases which have already passed through initial stages, the justice holding the Family Part shall arrange a pre-disposition conference with the parties, counsel and such other persons as may seem necessary or desirable, for the purpose of determining whether reconciliation or settlement between the parties is possible, and effecting such reconciliation or settlement whenever possible. In the event that reconciliation or settlement of differences and difficulties is not possible, the justice presiding shall decide the motions and set the contested actions or proceedings for trial on a date certain in the Family Part or other part of the Special Term, or, in the discretion of the court, by reference to a referee when a referee may act.

The Clerk of the Family Part under the supervision and direction of the justice holding the Part, shall make up a calendar of undefended matrimonial actions and proceedings in which settlement is not possible. This calendar shall be published at least two (2) days before the call and shall be called in the Family Part on each Friday of the Term. Causes adjourned from this calendar will be added to the undefended calendar of the adjourned date. Causes answered "ready" will be referred in regular order to official referees for hearing. Official Referee's calendars of such hearings will thereafter be published daily in the New York Law Journal.

This rule shall become effective September 1, 1955, and shall remain in effect until August 31, 1957.

For the duration of this rule, Rules I to VIII, inclusive, of the Special Term Rules shall to the extent necessary be controlled by the provisions hereof. (Added June 24, 1955.)

COMMITTEE ON PROFESSIONAL ETHICS

OPINION NO. 830

Question: May an attorney who has prepared an execution against the property of a judgment debtor deliver this court process to any person or agency (for example a collection agency) other than a City Marshal or Sheriff, pursuant to Section 130 of the Municipal Court Code of the City of New York, and thereby obviate the use of the services of a Marshal or Sheriff?

Opinion: Under Sections 130 and 135 of the New York City Municipal Court Code, an execution against the property of a judgment debtor when issued by an attorney for the judgment creditor *must* be directed to a City Marshal, or when issued subsequent to the filing of the transcript of such judgment with the County Clerk, must be directed to a Sheriff. Such execution may only be served or executed by a Marshal or in a proper case by a Sheriff (Section 151, Municipal Court Code).

Section 145.B makes it unlawful for any person to "hold himself out to the public as being a Marshal or as being in any way authorized to act as a Marshal or to perform the duties of a Marshal."

Accordingly, if an attorney who subscribes to an execution delivers the same to a person other than a Marshal with the knowledge that such person will or is likely to perform acts with respect to the execution, which may only be performed by a Marshal or a Sheriff, it is the opinion of the Committee that such conduct on the part of the attorney is improper.

November 7, 1957

OPINION NO. 831

Question: Attorney A contemplates taking into his employ attorney B to assist him in his practice. Attorney A desires to enter into a written contract of agreement with attorney B, in which, among other things, there will be a restrictive covenant which will in effect prohibit attorney B from soliciting or representing any of attorney A's clients in the event their association is severed.

Would such a restrictive covenant between attorneys violate any of the canons of ethics, and if not would such a restrictive covenant be improper for any reason whatsoever?

Opinion: The Committee does not answer questions of law and so does not express any opinion as to the enforceability of the proposed restrictive covenant.

The Committee, in its Opinion 811, has recognized that under Canons 7 and 27 a former employee of a lawyer is permitted to send formal announcements of the establishment of a new office to those clients of the office of his former employer to whom he is personally known, even where such personal relations originated with professional associations growing out of his former employment.

Canon 22 (Candor and Fairness) states that the conduct of a lawyer "with other lawyers should be characterized by candor and fairness," and Canon 29 (Upholding the Honor of the Profession) states that the lawyer "should uphold the honor and maintain the dignity of the profession."

The Committee does not believe the proposed restrictive covenant consistent with these Canons. Requiring such a covenant constitutes a demand that the rights of a lawyer be bargained away as a condition of employment and, further, appears to deny recognition to the general right of a client to an attorney of his own choosing.

November 7, 1957

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